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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1979

No. 79-1618*

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware corporation,

Petitioner,

vs.

RAYMOND KASSEL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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**See No. 79-1320, Raymond Kassel, et al., v. Consolidated Freightways of Delaware, on appeal.*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Consolidated Freightways Corporation of Delaware [CF] respectfully prays that a Writ of Certiorari issue to review an order of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 16, 1980.

OPINION BELOW

Petitioner seeks review of an order of the Eighth Circuit denying attorneys' fees under 42 USC §1988, which reads in its entirety as follows:

> "Bill of costs was filed by counsel for appellee. Response to appellee's bill of costs was filed by intervenor, Motor Club of Iowa. Appellants' resistance to appellee's bill of cost was also

> filed. The Court having considered this matter, it is now here ordered that costs of appellee, $131.40, be taxed to appellants. Costs are collectible in the United States District Court for the Southern District of Iowa.
>
> "It is further ordered that motion of appellee to tax disbursements and attorney's fees be and is hereby denied."

Petitioner timely filed a motion to vacate the order. The Eighth Circuit's disposition of that motion was by an order entered February 13, 1980, which reads in its entirety as follows:

> "The Court has considered appellee's [CF's] motion to vacate its order of January 16, 1980, and response thereto. It is now here ordered that appellee's motion be, and is hereby, denied."

No order or opinion has been rendered by the District Court on attorneys' fees. The Eighth Circuit acted on the claim for attorneys' fees on appeal in the first instance because the District Court had, before trial, separated all claims related to attorneys' fees from the case-in-chief which came before the Eighth Circuit on appeal.

JURISDICTION

The order of the Court of Appeals for the Eighth Circuit was entered January 16, 1980. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254 (1).

QUESTION PRESENTED

May a court, without articulating its rationale, summarily deny an application for attorneys' fees under 42 USC §1988?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§1983 Civil Action for Deprivation of Rights.

> "Every person who, under color of any statute, . . .of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, . . . secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

§1988 Proceedings in Vindication of Civil Rights.

> ". . . In any action or proceeding to enforce a provision of section[s] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs.

STATEMENT OF THE CASE

This Petition relates solely to a claim for attorneys' fees under 42 USC §§1983 and 1988. The related case-in-chief has been brought to this Court on appeal, in No. 79-1320, *Raymond Kassel et al. v. Consolidated Freightways Corporation of Delaware.*

Petitioner brought suit against Respondents, various employees and officials of the State of Iowa, to void an Iowa statute which excluded Petitioner's 65-foot twin trailer vehicles from Interstate Highways in Iowa. Both the District Court and the Eighth Circuit determined that the challenged statute burdened interstate commerce in violation of Art. I, §8, of the United States Constitution,

and sustained Petitioner's right to operate free from that burden on interstate commerce.[1]

Petitioner timely filed a Bill of Costs on appeal, including its claim for attorneys' fees under 42 USC §1988. The filing was accompanied by a notice that the District Court had separated the attorneys' fees claim from the case-in-chief and a request that the matter be referred to the District Court for disposition. Petitioner set out its claim for attorneys' fees on appeal in the Bill of Costs only because apparently required to do so to avoid waiver of the claim.[2]

On January 16, 1980, the Eighth Circuit denied attorneys' fees, without a statement of its rationale. Petitioner timely filed a motion to vacate which requested referral of the claim to the District Court or, in the alternative, an opportunity to file a brief and affidavits in support of the claim. On February 13, 1980, the Eighth Circuit denied the motion, again without a statement of its reasons.

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[1]Not only Petitioner's interests were at stake. Although the ban of 65-foot twins from Interstate Highways in Iowa costs Petitioner and its customers approximately two million dollars annually, the total cost burden exceeded 12 million dollars annually in 1974 by Iowa's estimate. *Consolidated Freightways v. Kassel*, 475 F. Supp. 544, f.n. 2 (1979).

More significantly, both the District Court and the Eighth Circuit found the Iowa statute to detract from safety, 475 F. Supp. 544, 550 (1979). *Consolidated Freightways v. Kassel*, 612 F. 2d 1064, 1070 (1979). The District Court succinctly stated its safety finding in denying Respondents' Motion to Stay, in its order of August 20, 1979: ". . . Under the circumstances, the granting of the stay would result in more accidents, more injuries, more fatalities and more fuel consumption, than would occur if the 65-foot twins were operated through Iowa over I-80 and I-35."

[2]Rule 39, FRAP, appears to require that all costs be filed within 14 days after entry of judgment, in order to avoid waiver. 42 USC §1988 provides that reasonable attorneys' fees may be awarded "as a part of the costs."

Petitioner's claim for attorneys' fees at trial is still pending before the District Court.

REASONS FOR GRANTING THE WRIT

1. THE ORDER CONTRADICTS THE RULE DEVELOPED BY OTHER CIRCUITS TO PROMOTE STATUTORY POLICY AND PERMIT INFORMED REVIEW.

The judgment of the trial and appellate courts establishes a *prima facie* case for grant of attorneys' fees under 42 USC §1988.[3] 42 USC §1988 was a direct Congressional response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which denied attorneys' fees absent a statutory basis for their award. Although attorneys' fees are discretionary under the statute, it was the stated intent of Congress that attorneys' fees are to be awarded "unless special circumstances would render such an award unjust."[4]

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[3]Interpreting 42 USC §1983, this Court has stated that the phrase "any rights . . . secured by the Constitution" embraces *"all* of the Constitution and laws of the United States," *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549, f.n. 16 (1972), citing *United States v. Price*, 383 U.S. 787, 796-797 (1966). It is well settled that individuals and corporations have a right to engage in interstate commerce, free from burdensome state regulation, under Art. I, §8, of the United States Constitution, *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 260 (1910); *Western Union Telegraph Company v. Kansas*, 216 U.S. 1, 37 (1910); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949).

[4]The standard was first enunciated in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). This standard has been uniformly adopted for attorney fees claims under 42 USC §1988 and was expressly cited in the legislative history of related amendments to 42 USC §§1983 and 1988, Senate Report No. 94-1011, 94th Congress, 2nd Session (June 29, 1976), reprinted in U.S. Code Cong. & Admin. News, 1976, p. 5908.

Until this case, the Circuit Courts of Appeal which considered the question, including the Eighth Circuit, had uniformly held that trial courts denying attorneys' fees permitted by statute must give their rationale, *Sergeant v. Sharp*, 579 F. 2d 645, 647 (1st Cir. 1978); *International Society for Krishna Consciousness, Inc. v. Andersen*, 569 F. 2d 1027, 1029 (8th Cir. 1978); *Kimbrough v. Arkansas Activities Association*, 574 F. 2d 423, 427 (8th Cir. 1978);[5] *Johnson v. Georgia Highway Express*, 488 F. 2d 714, 717 (5th Cir. 1974); *Lindy Bros. Builders of Philadelphia v. American R & S San. Corp.*, 487 F. 2d 161, 169-170 (3rd Cir. 1973); *Farmington Dowel Products Co. v. Foster Mfg. Co.*, 436 F. 2d 699, 701 (1st Cir. 1970).

In awarding or denying attorneys' fees, an appellate court is bound by the same standards as a trial court, *Hampton v. Hanrahan*, 600 F. 2d 600, 643 (7th Cir. 1979).

There are two reasons for requiring an articulation of the lower court's rationale in denying attorneys' fees under §1988. First, it preserves the Congressional policy of requiring an award absent special circumstances. A finding and explication of the special circumstances forces the court to consider the statute's provisions. Second, denial without explanation, without hearing, and without discernible consideration of the factors involved is a violation

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[5] "We are unable to determine from the District Court's order whether the court's denial of attorney's fees was based on an erroneous belief that the Act [42 USC §1983] did not authorize an award of fees in this case, or whether it was an exercise of its discretionary power under the Act. We, therefore, reverse and remand the cause to the District Court . . ." 574 F. 2d 423, 427

of due process. The violation is particularly repugnant as the lack of a statement of the reasons denies effective review.[6]

In denying attorneys' fees, the Court of Appeals provided no rationale for its order. It neither afforded a full hearing nor permitted filing of a brief and affidavits despite Petitioner's request for an opportunity to address the question. Informed review of the Appellate Court's rationale is made impractical.

2. REQUESTED RELIEF.

Petitioner does not request that this Court determine the propriety of awarding fees in this case. Petitioner requests that, this Court exercise its supervisory powers and remand to the Eighth Circuit with instructions to vacate its order and either (1) reconsider the matter and state the

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[6]"Summary disposition . . . followed by issuance of an order denying counsel fees without an adequate statement of the reasons for the order does not meet minimum standards for procedural fairness and regularity. . . . Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion. [Citations omitted.]" *Sergeant v. Sharp*, 579 F. 2d 645, 647 (1st Cir. 1978).

reasons for its decision or (2) remand to the District Court for an initial determination of the claim for attorneys' fees.[7]

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[7]Deference to the trial court on attorneys' fee claims is more than a procedural nicety; it is a substantive and practical approach. The proposition finds its statement in *Souza v. Southworth*, 564 F. 2d 609, 613-614 (1st Cir. 1977);

> "The Supreme Court has recognized the power of a district court to award fees for appellate work under Section 4 of the Clayton Act, *Perkins v. Standard Oil Co. of California*, 399 U.S. 222, 90 S.Ct. 1989, 26 L.Ed. 2d 534 (1970), and the Court of Appeals for the District of Columbia Circuit has argued that as a general rule a district court should in the first instance set the fee for services rendered on appeal. *Wilderness Society v. Morton*, 161 U.S. App. D.C. 446, 495 F. 2d 1026, 1036 (D.C. Cir. 1974), *rev'd sub nom., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 44 L.Ed. 2d 141 (1975). Persuasive arguments support the position staked out in *Wilderness Society*. Although a court of appeals might be in the best position to assess the importance and complexity of a case on appeal and the quality of the performance by the attorneys that appear before it, other factors going into a fee determination require factual findings more appropriately made by a district court. . . . As this case illustrates, a district court cannot fully evaluate such litigation without taking into account the history of the dispute on appeal. Having evaluated the appellate work of the attorneys, the district court properly may assign a price tag to it.

The deference is particularly apt in Commerce Clause cases. It is said that Commerce Clause litigation depends in large part on the thoroughness of the attorneys, *Raymond v. Rice*, 434 U.S. 429, 447-448, f.n. 25 (1978).

CONCLUSION

For these reasons, Petitioner requests that a Writ of Certiorari be issued.

Respectfully submitted,

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